

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Petition of)	
)	
Comcast Cable Communications, LLC,)	
on behalf of its subsidiaries and affiliates)	
)	CSR-8625-A
)	Docket 12-114
For Modification of the Television Market of)	
Station WFBD, Destin, Florida)	
(Facility ID 81669))	
)	
To: Chief, Media Bureau)	

Opposition to Petition for Special Relief

George S. Flinn, Jr. (hereinafter "Flinn"), by his attorney, hereby respectfully submits his Opposition to the "Petition for Special Relief" (hereinafter "Opposition") filed by Comcast Cable Communications, LLC (hereinafter "Comcast") in the above-referenced proceeding. In support thereof, the following is shown:

A. Background

Flinn is the licensee of WFBD, a full power commercial television broadcast station licensed to Destin, Florida. WFBD has been on the air for less than seven years (i.e., the station commenced operation on September 5, 2005).

On September 19, 2011, Flinn served timely notice on Comcast that WFBD was electing mandatory carriage on Comcast's cable system(s) serving the Mobile, AL-Pensacola (Ft. Walton Beach), FL DMA for the three year election cycle beginning January 1, 2012 and ending December 31, 2014.

Comcast failed to either (a) implement carriage of WFBD or (b) respond to

Flinn's September 19, 2011 carriage request . As such, on February 9, 2012, Flinn forwarded another detailed letter to Comcast delineating why carriage of WFBD was appropriate. In addition, Flinn's February 9, 2012 letter stated:

As noted in Flinn's initial September 19, 2011 carriage election notice to Comcast, [p]lease be advised that in the event you are unable to receive a good quality WFBD signal (as defined by the FCC's rules) at all of your principal headends in the DMA, WFBD agrees to be responsible for the costs of delivering to those systems a good quality signal via alternative means pursuant to 47 C.F.R. 76.55(c)(3).

Consistent with the foregoing (and in the event that Comcast preliminarily determines that there is an insufficient over-the-air WFBD signal at the head-end), WFBD has arranged for the employment of a fiber feed to ensure a "good quality" signal at the Comcast headend.

In a letter dated March 9, 2012, Comcast denied Flinn's carriage request, citing signal measurements which preliminarily indicate "that WFBD does not deliver a good quality over-the-air signal to either of Comcast's principal headend facilities in the DMA". Comcast's March 9, 2012 letter completely ignored Flinn's affirmative representation that "should Comcast be unable to receive a good quality WFBD signal (as defined by the FCC's rules) at all of Comcast's principal headends in the DMA, WFBD agrees to be responsible for the costs of delivering to those systems a good quality signal via alternative means pursuant to 47 C.F.R. 76.55(c)(3)".

On March 28, 2012, Flinn timely filed a Complaint demonstrating that Comcast has improperly failed to carry WFBD, Destin, Florida on its cable television system(s) serving the Mobile, AL-Pensacola (Ft. Walton Beach), Florida DMA and respectfully requesting (a) that a determination be rendered by the Commission that Comcast has failed to meet its must-carry obligations with respect to carriage of WFBD and (b) that

the Commission order Comcast, within 45 days of such order, to commence carriage of WFBD, Destin, Florida.

In its Opposition to Flinn's carriage Complaint, Comcast admits that it should be carrying WFBD. The only justification Comcast advanced for failing to carry WFBD is that it believes that the Commission will act favorably upon the subject "Petition for Special Relief" which Comcast filed contemporaneously with its Opposition to Flinn's Complaint.

B. General

Congress and the FCC have long recognized that stations in their DMA possess a presumption of carriage (see, e.g., Gray Television Licensee, Inc. [CSR-7007-A], Memorandum Opinion and Order, DA 06-1566, released August 4, 2006). That being said, Comcast correctly noted in its Petition for Special Relief that in limited circumstances, the Commission may, "following a written request ...with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section".¹

In its Petition for Special Relief, Comcast sets out four factors (discussed in more detail hereinbelow) which the Commission has traditionally reviewed as part of its consideration of market modification requests. Those four factors are not the only factors. Similarly, they are not in and of themselves dispositive. Rather, they are part of a comprehensive analysis of the particular factual situation and how the purposes of

¹ 47 U.S.C. Section 543(h)(1)(C).

the Commission's carriage/market modification rules will best be effectuated.

C. Localism Factors

I. Historical Carriage

Comcast affords great weight to the fact that WFBD has never been historically carried on Comcast's cable systems in the Mobile area. Since Comcast has refused to this day to carry WFBD despite repeated requests (and the filing of an FCC Complaint), such an argument rings hollow. Comcast can't have it both ways: It can't deny carriage to a station, then argue that the station has never been carried on its system.

Comcast's actions are particularly egregious in this case since WFBD has been on the air less than seven years and is essentially a new station. Denying WFBD an opportunity to demonstrate that it can have a historical market presence is counter to the spirit of the FCC's rules. Essentially, Comcast is saying "we know your station is new or fledgling; we will deny carriage since it will help support our case that your station is not accepted in the market".

In short, Flinn concedes that Comcast has historically refused to carry WFBD and that such refusal has led to suppressed numbers regarding historical market presence. However, Comcast is estopped by virtue of the doctrine of unclean hands from (a) erecting viewership hurdles and affirmatively blocking carriage of WFBD and (b) then claiming a lack of carriage/market presence. To reward Comcast for affirmatively denying initial carriage to deserving new stations will have the unintended (or intended, in the case of Comcast) consequence of (a) stations being unable to empirically establish proof of market acceptance and (b) Comcast (and other like-minded cable systems) having a clear incentive to challenge carriage of new stations at

an earlier and earlier point after initial station sign-on.

Comcast points out correctly in its Petition for Special Relief that the current signal of WFBD over the communities in question is not as strong as those of other stations from Destin/Pensacola (i.e., which are being carried by Comcast). This is directly related to the fact that there is currently a processing freeze in place with respect to any TV channel changes (see Public Notice, DA 11-959, released May 31, 2011) while the FCC considers issues related to the Broadband Plan and channel repacking. While Comcast will undoubtedly chide WFBD for not filing for a channel change prior to the freeze, such a position ignores the realities WFBD has faced as a new independent station in an uncertain economic market. Given the uncertainties of the broadband proceeding, WFBD shouldn't be viewed in an unfavorable light (particularly on the heels of the lengthy DTV transition) for having exercised prudence with respect to choosing a new channel prior to the imposition of the May 31, 2011 freeze. It is now clear that WFBD will be forced from its Channel 48 location as part of a repack. Attached hereto is an engineering showing which demonstrates that once the freeze is lifted, WFBD will be in a position to immediately file for a new channel (such as Channel 5) which will alleviate any of the over-the-air signal issues raised by Comcast and will enhance WFBD's overall market presence (including in the areas challenged by Comcast).²

² As may also be noted in the attached engineering showing, the modified WFBD facilities would replicate the over-the-air signals of numerous Destin/Pensacola and Mobile, AL area stations currently being carried by Comcast on its Mobile systems (see Exhibit 6 to Comcast's Petition for Special Relief).

Finally, Comcast argues that affording must carry status to WFBD would “disserve Petitioner’s subscribers by limiting Petitioner’s flexibility to provide programming and services that its customers prefer”. Putting aside the fact that Comcast’s customers will not know if they prefer WFBD’s current programming if Comcast continues to block WFBD’s access to its systems, Comcast has made no showing whatsoever that channel scarcity exists with respect to its systems. In fact, a review of Exhibit 6 to Comcast’s Petition for Special Relief reflects that there is no such scarcity.³ If anything, Exhibit 6 demonstrates that Comcast has chosen to carry the secondary channels of several favored stations in lieu of carrying WFBD. WFBD respectfully believes that Comcast’s “limited flexibility” argument is a smokescreen given the available channels and WFBD’s willingness to locate to an available open channel.

II. Local Service to Communities

As noted above, Comcast’s Petition for Special Relief is basically a preemptive strike seeking to eviscerate a new, fledgling station before it is able to establish a strong foothold in the entire market. Within the last several months, WFBD has entered into a programming arrangement with respected local specialty programmer Blab TV. In addition, the station has commissioned the use of fiber which has facilitated carriage of WFBD on DISH, DIRECTV and Mediacom in Mobile. WFBD’s financial and programming commitment to Mobile and the whole market is clear.

Comcast also claims that WFBD’s programming has not been shown to be local

³ WFBD reiterates its position (outlined in its Reply to Opposition to Complaint) that it is willing to be carried, as an accommodation to Comcast, on any available Comcast channel (nearest the other local stations in the market) as opposed to its over-the-air channel.

enough. Putting aside Comcast's affirmative efforts to block carriage of WFBD, it is respectfully submitted that before Comcast can complain about a station's perceived lack of local content, said station should be allowed to develop and market same over a reasonable time period before being deemed a local failure. While Comcast disparages Blab TV as offering mostly paid programming, it ignores that the focus of the programming is local. While shows such as "Genie Bra", "Ab Rocket Twister", "Tummy Tuck Slimming System" and "Brazil Butt Lift Workout" (carried on Comcast's Mobile systems; see Exhibit 15 to Comcast's Petition for Special Relief) are undoubtedly fine shows, it is hard to imagine that they represent the type of groundbreaking local content which far eclipses that of WFBD.

Finally, Comcast places much emphasis on the driving distances and geographic separation between communities in the DMA. What Comcast fails to adequately discuss is the nature of the DMA itself. The Mobile, AL-Pensacola (Ft. Walton Beach), FL DMA is a hybrid DMA which can best be described as an extended rectangle. Any communities in the eastern or western portions of the DMA are going to be relatively distant from each other simply by virtue of the layout of the DMA. The paring of outlying DMA communities simply because the DMA is not traditionally shaped runs counter to the purposes of the market modification rule.

III. Other Programming/Viewing Patterns

In establishing that other local programming in a market could be considered by the FCC in assessing a station's market impact, implicit therein was the requirement that there be channel scarcity. No such scarcity exists in this case. Further, nowhere was it contemplated that a cable provider would become a content gatekeeper. In fact,

in granting the Comcast/NBCU merger (See, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., Memorandum Opinion and Order*, MB Docket 10-56, released January 20, 2011, the exact opposite was the case. Despite serious concerns expressed by commenting parties in the proceeding regarding the power the new cable and programming behemoth would yield, the FCC granted the merger based upon its belief that the Commission would examine any future programming and carriage complaints with an eye toward the new market realities and Comcast's actions generally.

Comcast's actions in this case cannot reasonably be considered content neutral. By their own admission in Exhibit 6, Comcast has chosen to carry preferred stations and other secondary channels in lieu of carrying WFBD. Again, Comcast is in the unique position of (a) being able to erect viewership hurdles and suppress market acceptance of WFBD and (b) prevent the compilation of realistic, empirical data supporting WFBD's historical market acceptance and reach. This is particularly true when there is no "bright line" test to determine what constitutes proof of market acceptance. In the case at hand, four out of the eight over-the-air stations carried by Comcast (see Exhibit 16 to Comcast's Petition for Special Relief) hover around a 1 share (and a few hundred households). Hardly the local powerhouses Comcast would like us to believe.

In an interesting twist, the fact that Comcast is carrying a large number of stations with small market shares actually supports WFBD's arguments. In a fast-changing and fragmented multi-platform world, how the FCC analyzes market modifications must similarly evolve. Analysis of ratings numbers in a vacuum will not

communications industry. Television and cable viewership ratings are no longer dispositive indicia of success or market importance. As the local community tapestry evolves, what constitutes locally responsive programming is not as simple as “does the station supply sports or hourly news”. As Comcast concedes in its Exhibit 16, even a station serving just 123 households (out of 23,000 or more) is deserving carriage. Programming diversity is to be embraced, not mocked. Niche programming may only appeal to a discrete number of viewers but it may be critically important to that particular group of local citizens.

D. Conclusion

Comcast will undoubtedly argue that the subject matter is analogous to a prior FCC decision involving WPAN, Fort Walton Beach, Florida (See *Comcast Cable Communications, LLC*, 20 FCC Rcd. 10093 [2005]) (hereinafter “WPAN”), wherein the FCC granted a market modification with respect to a station which had been on the air for 20 years. Changes in channel capacity, the existence of a processing freeze, the evolving broadband plan and related repack and the fact that WFBD has been on the air less than seven years (as opposed to twenty in the WPAN case) all militate in favor of allowing WFBD’s television market to remain as presently constituted.

As Flinn noted in its Complaint (and Reply to Opposition), it was never the intention of the FCC (in connection with market modifications) to hinder the development of fledgling stations. The basic goal of a market modification is to reform a station’s DMA to reflect the actual, long-term realities of said station’s reach, influence, economic reach and local market presence generally. The FCC recognizes that stations take time to get built, work through operational issues, work through

that stations take time to get built, work through operational issues, work through programming issues, make technical adjustments and come through the other side a better station. Market modifications were never meant to be a procedural hammer used to crush fledgling stations

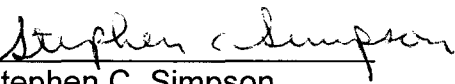
Comcast will probably argue that WFBD can always reapply for modification of its market if (a) the FCC grants Comcast's subject Petition for Special Relief and (b) WFBD obtains its post-freeze channel change. Flinn respectfully disagrees. Such a yo-yo process, changing every time there is a programming tweak at a station or some future FCC freeze, is wasteful of FCC resources and generally counterproductive. Market modification requests were not meant to be procedural ping pongs hit back and forth as minor changes to a market, a station or a DMA occur.

Finally, at the end of the day, when all the background noise about driving times and whether Comcast has become too powerful a content gatekeeper has been silenced, this case is about whether WFBD has been given a fair shot at establishing that it intends to serve all of the DMA, including the communities at issue. WFBD wants to rectify any perceived over-the-air signal deficiencies but is precluded from doing so by the pending freeze. WFBD believes that its new programming will take root over the next few months and that empirical data will support its position that it is a locally focused station, both in Mobile and across the DMA. Comcast's need for "program flexibility" aside, no true harm to Comcast will occur if the market modification requested herein is denied. Comcast can always refile the request once a reasonable period of time has elapsed and the parties have a better feel for the impact WFBD will have on the Mobile market and the communities in question.

Wherefore, based on the foregoing, it is respectfully requested that Comcast's
"Petition for Special Relief" be denied.

Respectfully submitted,

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By: 
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His Attorney

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TECHNICAL EXHIBIT
ALLOCATION AND COVERAGE STUDY
TELEVISION STATION WFBD(TV)
DESTIN, FLORIDA

Technical Narrative

This Technical Exhibit was prepared on behalf of television station WFBD(TV) on channel 48 with its community of license assigned to Destin, Florida located within the Mobile/Pensacola DMA. This analysis demonstrates that if the FCC permitted channel changes to existing allocated DTV stations, a new channel and transmitter site could be so allocated by the Commission for WFBD(TV) that would provide coverage over the community of Mobile, Alabama.¹

WFBD(TV) is licensed on Channel 48 with a maximum effective radiated power of 1,000 kilowatts from a 1,099 foot tall tower in north Okaloosa County, Florida. From a technical perspective, WFBD(TV) could be allocated on channel 5 from an existing tower located in Escambia County, Florida and whose FCC predicted noise-limited contour would encompass the community of Mobile, Alabama.

The hypothetical WFBD(TV) Channel 5 allotment effective radiated power and antenna height above average terrain complies with Section 73.622(f)(8) of the Commission's Rules. Also, the hypothetical allotment does comply with the 0.5 percent interference standard adopted by the FCC for post-transition operations.

¹ The FCC is presently not accepting Petitions to change the DTV Table of Allotments so as "To permit the Commission to evaluate its reallocation and repacking proposals and their impact on the Post-Transition Table of DTV Allotments." See *FCC Public Notice Freeze on the Filing of Petitions for Digital Channel Substitutions, Effective Immediately*, May 31, 2011.

Below are the hypothetical Channel 5 allotment parameters.

Facility ID	State & City		NTSC	DTV							
			Chan	Chan	ERP (kW)	HAAT (m)	Latitude (DDMMSS)	Longitude (DDMMSS)	Area (sq km)	Population (thousand)	Percent IX Received
81669	FL	Destin	--	5	25	429	304220	0872412	45968	1357	0.00
Non-Directional Antenna											

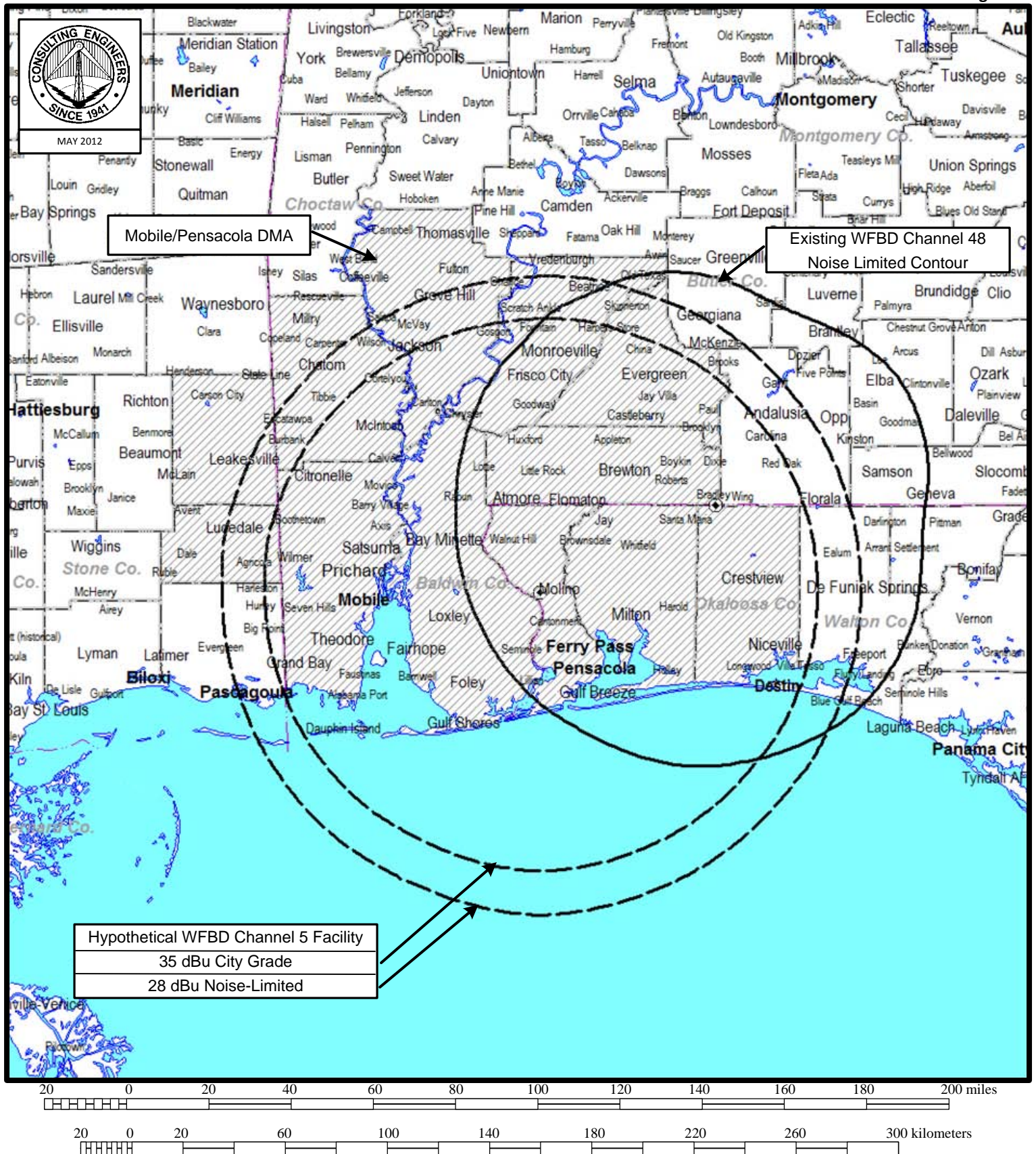
Figure 1 is a map showing the noise-limited contours for the existing and the hypothetical Channel 5 facility. Figure 2 is a map showing the FCC predicted noise-limited coverage contours for stations providing licensed service to the subject DMA.

Charles A. Cooper

du Treil, Lundin & Rackley, Inc.
201 Fletcher Avenue
Sarasota, Florida 34237
941.329.6000

May 17, 2012

Figure 1



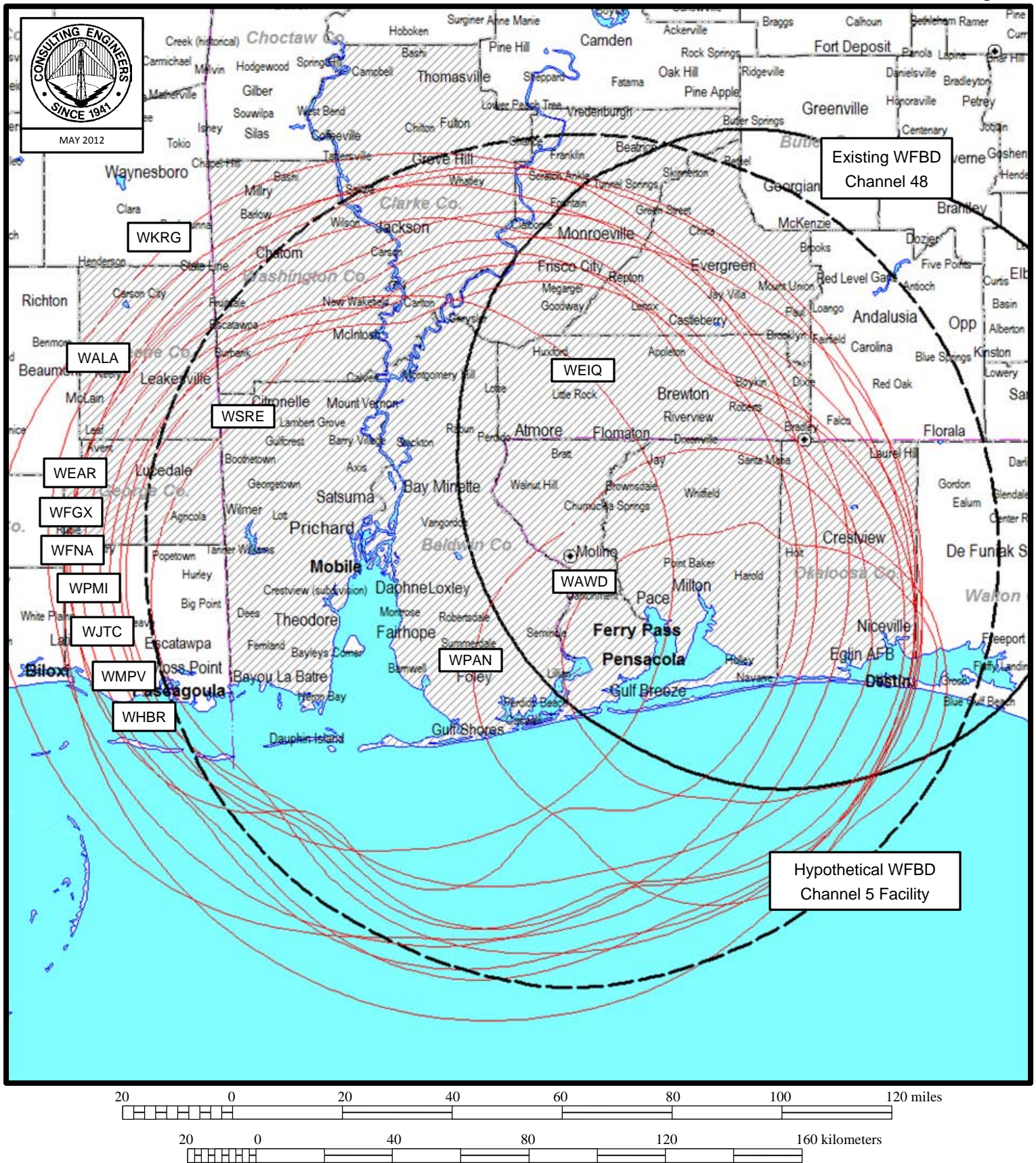
FCC PREDICTED COVERAGE CONTOURS

TELEVISION STATION WFBD(TV)

DESTIN, FLORIDA

du Treil, Lundin & Rackley, Inc Sarasota, Florida

Figure 2



FCC PREDICTED NOISE-LIMITED COVERAGE CONTOURS OF STATIONS PROVIDING SERVICE TO MOBILE/PENSACOLA DMA

TELEVISION STATION WFBD(TV)

DESTIN, FLORIDA

du Treil, Lundin & Rackley, Inc Sarasota, Florida

Certificate of Service

I hereby certify that a copy of the foregoing document was this 17th day of May, 2012 sent by First Class U.S. mail, postage prepaid, to the following:

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